

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**



Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 1318/2022

In the matter between: -

FEZI CONSULTANTS & AUDITORS (PTY) LTD

Applicant

And

**CENTLEC (SOC) LTD
MAKOMOTA INVESTMENT HOLDINGS (PTY) LTD**

1st Respondent
2nd Respondent

CORAM: MBHELE, AJP *et* DANISO, J

HEARD ON: This application was considered on heads of argument in chambers in terms of Section 19 (A) of the Superior Courts Act 10 of 2013.

DELIVERED ON: 27 DECEMBER 2023

[1] This is an application for leave to appeal against our judgment that was delivered on 15 August 2023, in which we made the following orders:

1.1 The application is dismissed with costs.

1. 2 Costs to include that of counsel.

[2] The grounds on which leave to appeal is sought are listed extensively in the application and to avoid prolixity I shall not repeat same herein. The costs order made against the applicant is also the subject of this application.

[3] Leave to appeal is governed by Section 17 of the Superior Courts Act 10 of 2013 (the Act). Subsection 17(1)(a) – (c) reads as follows:

(1) *“Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

(a) (i) *the appeal would have a reasonable prospect of success; or*
(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

(b) *the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and;*

(c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

[4] It is well established that the existing provisions of the Act raise the standard to be met by an applicant in a leave to appeal. The test for granting leave to appeal is whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success.¹ See also *Democratic Alliance v President of the Republic of South Africa and Others*² where the following was said:

“The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, Van Heerden v Cronwright and Others 1985(2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word ‘would ‘as opposed to ‘might ‘serves to emphasise this point. As the Supreme Court of Appeal said in Smith v S 2012(1) SACR 567 (SCA) at para 7;

‘More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as

¹ *Mothuloe Incorporated Attorneys v The Law Society of the Northern Province* 2017 JDR 533 (SCA) at para 18.

² (21424/2020) [2020] ZAGPPHC 326(29 July 2020) paras [4] - [5].

hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] In *The Mont Chevaux Trust v Tina Goosen and 18 Others*³ the court said the following:

*"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the said new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."*

[6] It is clear from the above authorities that in leave to appeal applications a Judge's discretion is not absolute, it has to be exercised in conformity with section 17(1). The Act places a heavy onus on the applicant to show why another court would come to a different conclusion. It must be clear at the time of granting leave to appeal that prospects of success on appeal are real and not fanciful.

[7] The gravamen of the applicant's complaint is that it was not the first respondent's case that the applicant's bid pricing is predicated on the wrong notion that bidders had to compile a Fixed Asset Register from scratch. The applicant submits that the first respondent's case was all along that because the applicant did not quote a fixed price for Item 4, the Bid Evaluation Committee could not ascertain the amount that the applicant quoted.

[8] The respondent's answering affidavit deals with the scope and conditions of the bid as well as the evaluation criteria. It is apposite to quote the relevant parts of the respondent's answering affidavit. The paragraphs below⁴ will show that the first respondent indicated that the applicant was wrong to use the total amounts of the first respondent's estimated assets as the basis for

³ Unreported judgment of the Land Claims Court of South Africa Case No LCC 14R/2014 delivered on 3 November 2014.

⁴ Paragraphs 47, 49, 55 and 56 of the founding affidavit.

quoting in items 1 and 2 and in the end import those amounts to item 4 as well:

- '47. *As a point of departure, it is purposely stated that CENTLEC does currently have a Fixed Asset Register with an approximate value of R6 344 790 101.00 (six billion three hundred and forty-four million seven hundred and ninety thousand one hundred and one rand). The total number of assets are currently estimated at 1 030 501.00 (one million and thirty thousand five hundred and one). The aforesaid facts should be in the applicant's knowledge as a partner to a joint venture who were the insurance brokers of CENTLEC at the time of the bid submissions. The owner of FEZI was also a previous member of the CENTLEC Board.*
49. *To reiterate and put it into context the current bid relates to, inter alia:*
- 49.1. *the performance of a physical verification (and update/include GIS shape files) of all additions of electricity infrastructure assets, per the Entities Fixed Asset Register and updated periodically during the financial year under review.*
- 49.2. *In addition to the aforesaid to perform a condition assessment of each item of electricity infrastructure assets listed per the Entity's Fixed Asset Register.*
- 49.3. *To draft the required adjusting journals to account for changes arising from the asset related process (e.g. depreciation, disposals, work in progress).*
- 49.4. *And lastly, to compile a detailed working paper file with sufficient support for all adjustments made to the Fixed Asset Register.*
55. *What made the exercise even more arduous for the BEC, is that ITEMS 1 and 2 in the Pricing Schedule refer to additions to the electricity infrastructure assets and ITEM 4, on the other hand, refers to all the current assets of CENTLEC, which includes additions, amongst others.*
56. *For FEZI to simply quote that the once off amount required for ITEM 4 is included in the price per asset made the calculation near impossible for the BEC. Especially because no fixed amount of additional assets was stipulated in the bid documents. FEZI could thus not use the total amount of assets (1 030 501) to quote for ITEMS 1 and 2, and in the end use those amounts of assets to quote for ITEM 4 as well.'*

- [9] The applicant contends further that there was no provision in the bid document on how item 4 was to be complied with (recording of all assets in the Fixed Asset Register of CENTLEC as per current componentisation) nor did the first respondent suggest that the methodology that the applicant intended employing in recording all assets in the Fixed Asset Register did not meet the bid.
- [10] The applicant prepared its bid from the premise that it had to do physical verification of all assets in the Fixed Asset Register and thereafter record them in the Fixed Assets Register. It has always been the respondent's case that the successful bidder would only have to do physical verification of additional items to the Fixed Asset Register year on year and that item 4 would be a desktop exercise where the first respondent had to account for depreciation per each asset and disposals.⁵

⁵ 'Paragraph 59 of the answering affidavit 'The starting point for item 4 would be the previous year's Fixed Asset Register. The successful bidder has to literally update the said register and make sure that it is compliant with GRAP standards. This is the most important aspect and a time consuming desktop exercise. It not only deals with additions brought into account, CENTLEC has to account for depreciation per each and every asset, disposal, etc. In the end CENTLEC needs to provide the Auditor General with an actual GRAP compliant register.'

4. Technical Specifications

- [11] A closer look at paragraph 4.2 dealing with *technical specifications*⁶ supports the first respondent's assertion. It is clear that the applicant's bid would not have met the requirements of the tender thus the applicant's inability to quote for 3 years successively in respect of item 4. The applicant's bid was totally off the mark as demonstrated by the first respondent.
- [12] Having considered the merits of the application for leave to appeal, I am not persuaded that there would be reasonable prospects of success on appeal. The applicants contend that we erred in granting a costs order against them and that they ought to have been afforded the protection of *Biowatch* rule.⁷ The *Biowatch* principle was articulated as follows:

'If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door.'

- [13] The starting point in constitutional litigation is that an unsuccessful private litigant in proceedings against the State ordinarily ought not to be ordered to pay costs. *Biowatch* has not stripped the court off its discretion to award

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- 4.1. Develop the verification and condition assessment methodology (using a sliding scale) which should be submitted to the Management, Auditor General and National Treasury for approval.
- 4.2. Perform a physical verification (and update / include GIS shape files) of all additions of electricity infrastructure assets, per the entity's Fixed Asset Register and updated periodically during financial year under review.
- 4.3. Perform a condition assessment of each item of electricity infrastructure assets listed per the entity's Fixed Asset Register.
- 4.4. The team should be available, after the assignment, to assist in addressing Audit queries based on the valuations that they have performed.
- 4.5. Draft the required adjusting journals to account for changes arising from the asset related process (e.g. Depreciation, Disposals, Work in Progress).
- 4.6. Compile a detailed working paper file with sufficient support for all adjustments make to the Fixed Asset Register.

⁷ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80 / 08) [2009] ZACC 14; 2009(6) SA 232 (CC).

costs. *Biowatch* serves as a guide for awarding of costs in constitutional litigation. The rule is not unqualified. The court in *Biowatch* further held:

'[24] At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.'

*[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.'*⁸

[14] I have no doubt that *Biowatch* rule is aimed at protecting litigants who approached court to enforce a right that is guaranteed in the constitution. In *Motala v Master, North Gauteng High Court, Pretoria*⁹ the Supreme Court of Appeal remarked that *Biowatch* principle does not constitute a license to litigate with impunity against the State. In *Lawyers for Human Rights v Minister in the Presidency and Others* the court remarked as follows:¹⁰

'[The Biowatch rule], of course, does not mean risk-free constitutional litigation. The court, in its discretion, might order costs, Biowatch said, if the constitutional grounds

⁸ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80 / 08) [2009] ZACC 14; 2009(6) SA 232 (CC).

⁹ *Motala v Master, North Gauteng High Court* [2019] ZASCA 60; 2019 (6) SA 68 (SCA) para 98.

¹⁰ *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) para 18.

of attack are frivolous or vexatious - or if the litigant has acted from improper motives or there are other circumstances that make it in the interests of justice to order costs. The High Court controls its process. It does so with a measure of flexibility. So a court must consider the "character of the litigation and [the litigant's] conduct in pursuit of it", even where the litigant seeks to assert constitutional rights.'

[15] The applicant submitted a bid that did not meet the set criteria. Although the applicant approached court to enforce a right in terms of the Promotion of Administrative Justice Act¹¹ which finds its origin in the Constitution,¹² there is no genuine constitutional issue raised by the applicant. It was clear that the applicant misunderstood the set criteria of the bid and it, nevertheless, pursued this litigation. *Biowatch* was not aimed at protecting litigants who bring frivolous and vexatious issues to court. The *Biowatch* protection is available to litigants who are raising genuine constitutional issues.

[16] Having concluded that none of the grounds of appeal enjoy reasonable prospects of success, whether taken singly or cumulatively, the application for leave to appeal ought to fail.

[17] I make the following order:

Order:

1. The application for leave to appeal is dismissed with costs.
2. Costs to include those consequent in the employment of counsel.

NM MBHELE, AJP

I concur

NS DANISO, J

Appearances:

¹¹ The Promotion of Administrative Justice Act 3 of 2000.

¹² Constitution of the Republic of South Africa, 1996.

For the Applicants:

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